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MARZAINI ZAINUDDIN

v.

MAJLIS PEGUAM MALAYSIA

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HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
T SELVENTHIRANATHAN J
HISHAMUDIN MOHD YUNUS J
[CIVIL APPEAL NO: R-17B-17-2006]

C

21 SEPTEMBER 2006

LEGAL PROFESSION: *Professional discipline - Misconduct - Misappropriation of client's money - Grave offence - Order of suspension pending inquiry made by Disciplinary Board - Section 94(4)(c) of the Legal Profession Act 1976 - Appeal - Validity of interim order of suspension - Duty of*

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Bar Council and Disciplinary Board to protect and safeguard members of public by maintaining high standard of conduct amongst legal practitioners - Disciplinary Board's order justified

One Madam Zubaidah ("Zubaidah") had lodged a complaint with the

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Bar Council against the appellant. She claimed that she had sold her property and the appellant as the solicitor had received the full purchase price from the purchasers' financiers' solicitors. The appellant misappropriated the money and issued cheques to Zubaidah which were dishonoured. At the hearing before the DB, the appellant admitted that she had used monies in her clients' accounts. The cheques were

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dishonoured as a result of insufficient funds in her clients' accounts. The DB made an order suspending the appellant from continuing her legal practice as an advocate and solicitor pending the inquiry pursuant to s. 94(4)(c) of the Legal Profession Act 1976. The appellant appealed against that order of interim suspension.

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Held (dismissing the appeal and confirming the order of the DB in suspending the appellant):

(1) In deciding whether to suspend an advocate and solicitor for "professional misconduct" both the Bar Council and the DB are

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required to balance the interest of the appellant as an advocate and solicitor with the interest of the public at large as well as the interest of the legal profession. Both the Bar Council and the DB owe a duty to protect and safeguard members of the public by maintaining a high standard of conduct amongst legal practitioners.

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The phrase "any dishonest act" in s. 94(4)(c) of the Act must be given a purposive interpretation rather than a literal one. (para 5)

(2) The interest of the public at large as well as the interest of the legal profession far outweighed the interest of the appellant. Misappropriation of client's money is a grave offence that demands severe punishment. In most cases, the courts would strike out the impugned advocate and solicitor from the Roll. Here, the appellant was only being suspended. Taking into account the appellant's admission of misappropriating Zubaidah's money, the DB's order was justified in the circumstances. (paras 5 & 6)

Case(s) referred to:
Akberdin Hj Abdul Kader & Anor v. Majlis Peguam Malaysia [2002] 4 CLJ 689 CA ***(refd)***
Au Ah Wah v. Lee Sow Keng & Ors [1981] 1 MLJ 303 ***(refd)***
Au Kong Weng v. Bar Committee, Pahang [1980] 1 LNS 4 FC ***(refd)***
In Re GH Conaghan [1961] 27 MLJ 81 ***(refd)***
Law Society of Singapore v. VCS Vardan [1999] 2 SLR 229 ***(refd)***
Pepper v. Hart [1993] 1 All ER 42 ***(refd)***
Re A Solicitor [1936] 5 MLJ 241 ***(refd)***
Wilson v. Clyde Rigging and Boiler Scaling Co [1959] SC 328 ***(refd)***

Legislation referred to:
Legal Profession Act 1976, ss. 93(3), 94(4)(c)

For the appellant - Victoria Martin; M/s Victoria Martin & Assoc
For the respondent - Sheila Lingam; M/s Shearn Delamore & Co

Reported by Amutha Suppayah

JUDGMENT

Abdul Malik Ishak J:

Introduction

[1] This is an appeal in encl. (1) filed by the appellant against the Disciplinary Board's ("DB's") decision to suspend the appellant from practice pursuant to s. 94(4)(c) of the Legal Profession Act 1976 ("the Act") pending a full inquiry into the complaint. The DB's order dated 22 April 2006 is found at p. 86 of the appeal record. The application under s. 94(4)(c) of the Act was made by the Bar Council by way of a letter dated 24 February 2006 as seen at pp. 1 to 3 of the appeal record. That s. 94(4)(c) of the Act reads as follows:

> 94 Power of Disciplinary Board to strike off the Roll, suspend for misconduct, etc
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> (4) Where an advocate and solicitor -

A (c) is the subject of a complaint concerning any dishonest act committed by him in his capacity as an advocate and solicitor;

and the Bar Council considers that it would be in the public interest or in the interest of his clients or of the profession that such advocate
B and solicitor be suspended from practice, the Bar Council may apply to the Disciplinary Board for an order suspending such advocate and solicitor from practice until further notice.

The Bar Council's application is based on a complaint lodged by one Madam Zubaidah binti Mohd Nasir ("Zubaidah") by way of a letter
C dated 18 March 2005 as seen at p. 4 to p. 24 of the appeal record with the annexures annexed thereto.

The Factual Background And The Decision

D **[2]** The facts are fairly simple and straightforward. It may be stated in this way. On 18 March 2005, Zubaidah lodged a complaint with the Bar Council. The gist of Zubaidah's complaint may chronologically be set out as follows:

(a) On 19 July 2004, Zubaidah entered into a sale and purchase
E agreement to sell her property for the sum of RM162,000 (see p. 6 to p. 11 of the appeal record).

(b) On 18 February 2005, the appellant confirmed receipt of the full purchase price of RM162,000 from the purchasers' financiers' solicitors (see p. 12 of the appeal record).
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(c) On 23 February 2005, the appellant issued a cheque for the sum of RM145,800 being the balance 90% of the purchase price to Zubaidah but, unfortunately, that cheque was dishonoured (see pp. 13 to 16 of the appeal record).
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(d) Being dissatisfied, Zubaidah then demanded the payment that was due from the appellant (see pp. 18 to 19 of the appeal record).

(e) On the appellant's request, Zubaidah agreed to extend the
H period of payment to 18 March 2005 (see pp. 20 to 21 of the appeal record).

(f) However, by 18 March 2005, the appellant failed to honour her undertaking to make the payment and this prompted Zubaidah to lodge a police report against the appellant (see pp. 22 to 23
I of the appeal record).

(g) Zubaidah, as alluded to earlier, also lodged a complaint against the appellant to the Bar Council by letter dated 18 March 2005 (see pp. 4 to 5 of the appeal record).

(h) Thereafter, the appellant attempted to pay Zubaidah a total of RM150,000 in the following manner:

(i) RM50,000 by way of an AmBank cheque number 501400 (see p. 25 of the appeal record); and

(ii) RM100,000 by way of a Maybank cheque number 925322 (see p. 84 of the appeal record).

(i) On 25 March 2005, Zubaidah withdrew her complaint with the Bar Council as reflected at p. 27 of the appeal record and that letter was worded in this way:

> I refer to my letter of complaint to you dated 18th March 2005. I wish to withdraw the said letter dated 18th March 2005 and do not wish the Bar Council to investigate the said matter. I regret for all the inconvenience caused. Thank you.

(j) However, on 6 July 2005, Zubaidah re-lodged the complaint against the appellant to the Bar Council on the following grounds (see p. 63 of the appeal record):

(i) that the AmBank cheque for RM50,000 was dishonoured (see p. 85 of the appeal record); and

(ii) that the Maybank cheque for RM100,000 was not from the appellant's clients' account, but, in fact, it was from one Dato' Lee Kam Sun (see p. 84 of the appeal record).

[3] The appellant has accepted full responsibility in respect of Zubaidah's complaint (see pp. 37 and 47 of the appeal record). She has admitted to the following state of affairs:

(a) that she was the sole partner in charge of the Kuala Lumpur's branch office;

(b) that all the files and accounts of the Kuala Lumpur branch office were solely handled by her since 2001;

(c) that Zubaidah's file was solely handled by her; and

(d) that the dishonoured cheques were solely signed by her.

[4] The written admissions by the appellant are certainly damning and receivable as evidence of the truth of the matter. An admission is a statement, express or implied, oral or written, which is adverse to a

party's case. An admission saves time in that the other side need not lead evidence to prove it. It is conclusive against the party making it and it establishes the fact in question and do away with the necessity of leading evidence to prove it (*Wilson v. Clyde Rigging and Boiler Scaling Co* [1959] SC 328). The value of an admission is demonstrated in the case of *Au Ah Wah v. Lee Sow Keng & Ors* [1981] 1 MLJ 303, where Raja Azlan Shah CJ (Malaya) (as His Majesty then was) aptly said:

> Inche Abdul Kadir for Mr. Au based his appeal on one ground only. He complained that the proceedings were treated as civil proceedings but is yet punitive in nature. He contended that since no procedure has been prescribed criminal procedure should have been applied. Though he did not say so, the implication is that if criminal procedure was applicable, then the burden of proof on the complainant, and in this case the Bar Committee Pahang, would be the criminal and not the civil burden.
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> The evidence before the Bar Committee consisted in the first place of an admission by Mr. Au that he had received a sum of money from a client. That was money that must be deposited in one or the other of the clients' accounts operated by him. It was not to be drawn out except for the client's purpose or to be returned to him. The other important item of evidence, backed by irrefutable evidence from the bank, was that at the material time, when Mr. Au wrote out a cheque for the specific purpose of returning this money to his client, there was no money in either or both his clients' accounts to meet this cheque. That cheque was stopped by Mr. Au for a reason not made known to the Bar Committee but as we have remarked earlier, if it had been presented, it would have been dishonoured for insufficient funds.
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> On this evidence, it seems to us to be an unnecessary and unjustifiable quibble to contend that the Bar Committee wrongly required the complaint to be proved by proof on a balance of probabilities. If the Bar Committee had required proof beyond reasonable doubt, it could not as a reasonable body of men have come to any other conclusion than that this evidence had discharged this burden more than amply.
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> We therefore dismissed the appeal with costs.

[5] Now, at the hearing before the DB on 22 April 2006, the appellant admitted that she had used monies in her clients' accounts. The cheques were dishonoured as a result of insufficient funds in her clients' accounts. The DB made an order suspending the appellant from continuing her legal practice as an advocate and solicitor pending the inquiry. The appeal in encl. (1) is against that order. It is an interim suspension and she is appealing to set it aside. The appellant is throwing herself at the mercy of this court. It seems that the appellant

had used the monies for the sake of her legal practice. The appellant had knowingly applied the monies for a wrong purpose. Such a conduct according to Thomson CJ in *In re G.H. Conaghan* [1961] 27 MLJ 81:

> … may or may not amount to fraud. It may or may not amount to dishonesty. It may or may not be capable of being described by the euphemism of 'miscalculation' which has been used, but it certainly does amount to professional misconduct of the most serious character.

I am concerned here with three interests to safeguard. In the words of Thomson CJ in the same case (see p. 81 of the report):

> There is the interest of the solicitor; there is the interest of the legal profession as a whole; and there is the interest of the public. The legal profession occupies by law a privileged position. The continued existence of that position can only be justified if every individual member of the profession conforms to certain standards.
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> The present respondent has fallen far short of these standards. In consequence he has done harm not only to himself but also to his client and to his profession as a whole and to the public for in the modern world it is in the public interest that there should be a legal profession observing the highest possible standards of conduct.
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> In the circumstances we feel we have no option but to order the respondent to be struck off. There will be an order that he pays the costs of these proceedings which we assess at $500.
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> Order accordingly.

Thus, in deciding whether to suspend an advocate and solicitor for "professional misconduct" both the Bar Council and the DB are required to balance the interest of the appellant as an advocate and solicitor with the interest of the public at large as well as the interest of the legal profession. Both the Bar Council and the DB owe a duty to protect and safeguard members of the public by maintaining a high standard of conduct amongst legal practitioners. The phrase "any dishonest act" appearing in s. 94(4)(c) of the Act must be given a purposive interpretation rather than a literal one (see the speech of Lord Griffiths in *Pepper v. Hart* [1993] 1 All ER 42, 50 as applied by the Court of Appeal in *Akberdin bin Hj Abdul Kader & Anor v. Majlis Peguam Malaysia* [2003] 1 MLJ 1). Having accepted "that the purpose of the Act is to protect the public from incompetent members of the legal profession" (per Gopal Sri Ram JCA in *Akberdin*'s case *(supra)* at p. 4), I have no choice but to confirm the order of the DB in suspending the appellant. Here, the interest of the public at large as well as the interest of the legal profession far outweigh the interest of the appellant. Both the Bar

Council and the DB must be seen to be serious in matters pertaining to dishonest conduct of an advocate and solicitor especially in cases of misappropriation of clients' monies.

[6] It is a serious offence to misappropriate a client's money. The courts have been consistent in its stand and have held that misappropriation of client's money is a grave offence that demands severe punishment. In most cases, the courts would strike out the impugned advocate and solicitor from the Roll (*Re A Solicitor* [1936] 5 MLJ 241; *In re G.H. Conaghan (supra)*; *Au Ah Wah v. Lee Sow Keng & Ors. (supra)*; and *Law Society of Singapore v. VCS Vardan* [1999] 2 SLR 229). Here, the appellant is only being suspended. Nevertheless, the complaint against the appellant is of a grave and serious nature. Taking into account the appellant's admission of misappropriating Zubaidah's money, it is my judgment that the DB's order is justified in the circumstances. The damage that may be caused to the reputation of the appellant pales in comparison to the damage that will inevitably be caused to the legal profession and the members of the public at large should the appeal in encl. (1) be allowed.

[7] It goes without saying that the legal profession in this country must observe the highest possible standards of conduct. Nothing short of that would suffice. Disciplinary proceedings against recalcitrant advocates and solicitors are designed to enable members of the same profession to decide on the fate of their fellow practitioners. This is simply because members of the same profession should know and appreciate better than anyone else the standards of conduct expected of the legal profession. The DB, which consists of senior members of the Bar appointed under s. 93(3) of the Act, thought it fit to suspend the appellant based on the evidence presented to them. The DB should know better. In the words of Raja Azlan Shah CJ (Malaya) in *Au Kong Weng v. Bar Committee, Pahang* [1980] 1 LNS 4:

> Statutes relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciates better than anyone else the standards which responsible legal opinion demands of its own profession.

I do not propose to disturb the order of the DB. Accordingly, for the reasons as adumbrated above, I dismiss the appellant's appeal in encl. (1) with costs.

[8] This is a unanimous decision of this court. This judgment has been shown in draft to Dato TS Nathan and Dato' Hj Mohd Hishamudin bin Hj Mohd Yunus, JJ, and they both agreed with it.